STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Honorable Janet Neff, Michael Smolenski, and Brian Zahra, Presiding

VIRGINIA M. JOLIET,

Plaintiff-Appellee,

-vs-

GREGORY E. PITONIAK,
Individually and as Mayor of
the City of Taylor, and
FRANK BACHA,

Defendants-Appellants.
_____/

Supreme Court No. 127175

Court of Appeals No. 247590

Lower Court No. 01 140733 CZ

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127175

DEFENDANTS-APPELLANTS' SUPPLEMENTAL BRIEF

PROOF OF SERVICE

Dated: June 17, 2005

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STATEMENT OF FACTS

Defendants-Appellants filed an Application for Leave to Appeal in this Court. Plaintiff-Appellee did not file a brief in opposition to that Application.

On May 27, 2005, this Supreme Court ordered the parties to submit supplemental briefs addressing: (1) what actions, if any, were taken by the two Defendants after October 8, 1998 that contributed to a discriminatory hostile work environment, so as to support a December 1, 1998 date of injury; (2) whether a December 1, 1998 accrual date for the injury to Plaintiff is sustainable for Defendant Frank Bacha, where he left his employment with the City of Taylor on October 8, 1998; and (3) the impact, if any, of this Court's decision in *Magee v DaimlerChrysler Corp*, 472 Mich 108 (2005). Defendant answers these questions in the following arguments.

ARGUMENTS

I. Defendants took no actions after October 8, 1998 that contributed to a discriminatory hostile work environment so as to support a December 1, 1998 date of injury.

The short answer to the first question that this Court addressed to the parties is "none." The Defendants took no actions after October 8, 1998 that contributed to an alleged discriminatory hostile work environment, so as to support a December 1, 1998 date of injury. Plaintiff's own sworn deposition testimony establishes the accuracy of Defendants' answer because Plaintiff testified that Defendant Pitoniak never talked to her and that she had no contact with Defendant Bacha after he went on leave in September of 1998.

As the following colloquy establishes, at her September 3, 2002 deposition, Plaintiff admitted that Defendant Bacha did not engage in any sexual or age discriminatory acts after he went on leave in September of 1998.

Q. Okay. And by the same token, then, after September of '98, Frank Bacha did not personally engage in any type of sexual or age discrimination against you?

A. No. (Defendants' Exhibit E, p 77.[1])

At her August 21, 2002 deposition, Plaintiff admitted, as follows, that there were no acts of harassment by Mr. Bacha after September 1998:

Q. Was there any type of harassment by Mr. Bacha that you're aware of after he went on leave in September of 1998?

A. No, I never saw him again. (Defendants' Exhibit D, p 61.)

With respect to Defendant Mayor Pitoniak, Plaintiff's Complaint alleges that he acted "in complicity" with Bacha's conduct. (Defendants' Exhibit B, Complaint, Count II, ¶ 37.) Mayor Pitoniak could not have done so after September of 1998 because, as explained, Plaintiff testified that Bacha did not engage in any sexual or age discrimination against her after September 1998. Thus, there were no acts by Bacha after September of 1998 with which Pitoniak could have acted "in complicity."

In addition, Plaintiff testified that Pitoniak never spoke with her. (Defendants' Exhibit E, pp 82-83, 86.) When asked at her deposition to identify specific acts by Mayor Pitoniak in October and November of 1998 that Plaintiff felt discriminated against her, Plaintiff testified that:

> The only thing that I can say is that Mayor Pitoniak kept promising and promising and promising to meet with me, and he would not meet with me. (Defendants' Exhibit E, p 93.)

[1] References to Defendants' Exhibits are the exhibits included in the Appendix to Defendants' Application for Leave to Appeal.

Failing to meet with an employee is clearly not sexual harassment. See, MCL 37.2103(i); *Corey v Detroit Bd of Ed*, 470 Mich 274 (2004). Nor is that action evidence of sexual or age discrimination.

Plaintiff also testified that she had no contact with any city official, and that there were no specific acts of discrimination by the Defendants, between November 24, 1998 and November 30, 1998. (Defendants' Exhibit E, pp 111-113.)

The Court should conclude that the undisputed evidence establishes that there were no actions taken by Defendants after October 8, 1998 that allegedly contributed to a hostile work environment for Plaintiff so as to support a December 1, 1998 date of injury.

II. This Court's decision in *Magee v DaimlerChrysler Corp* establishes that the lower courts erred by failing to find that Plaintiff's civil rights action is barred by MCL 600.5805.

This Court also directed the parties to explain the impact, if any, of its recent decision in *Magee v DaimlerChrysler Corp*, *supra*. *Magee* establishes that the lower courts erred by concluding that Plaintiff's civil rights action is not time barred.

The facts in *Magee* are analogous to the facts of the instant case. Plaintiff Magee brought a civil rights action alleging, *inter alia*, claims of sexual harassment and sex and age discrimination that allegedly had occurred during her employment at DaimlerChrysler. 472 Mich at 109. She went on medical leave on September 12, 1998 and, without returning to work, resigned her job on February 2, 1999. *Id.* at 110. Magee filed suit on February 1, 2002, claiming that she had been unlawfully discriminated against during most of her 22 years of employment with DaimlerChrysler. *Id.* Magee's complaint and amended complaint did not allege any act of harassment or retaliation after September 12, 1998. *Id.* at 111-112.

DaimlerChrysler argued that because Magee's February 1, 2002 complaint did not allege any discriminatory acts after September 12, 1998, the complaint was untimely under MCL 600.5805(10). (*Id.* at 110.) The Trial Court found that Magee's action was time barred after she filed an amended complaint that alleged harassment and retaliation only through September 12, 1998, the date that she went on medical leave. (*Id.*)

Relying on *Collins v Comerica Bank*, 468 Mich 628 (2003), the Court of Appeals concluded that Magee's claims accrued on her employment termination date, February 2, 1999, as opposed to her last day of work, September 12, 1998, and reversed the Trial Court's order that ruled that Magee's claim was barred by the period of limitations set forth in MCL 600.5805(10). 472 Mich at 111.

After granting Magee leave to appeal, this Court held that the Court of Appeals misapplied *Collins* and erroneously reinstated Magee's Civil Rights Act claims. *Id.* Specifically, this Court held:

> The Court of Appeals reliance on *Collins* to reinstate Magee's claims of sexual harassment, sex and age discrimination, and retaliation is misplaced. Magee was never terminated from her employment and does not allege discriminatory termination. She bases her Civil Rights Act claims on alleged discriminatory conduct that occurred before her leave of absence. Indeed, even when given a chance to amend her complaint to plead claims falling within the period of limitations, Magee was unable to do so. *Collins*, a discriminatory termination case, simply does not apply in this situation.
>
> To determine whether Magee's claims were timely filed, we look to MCL 600.5805(10), which establishes that the applicable period of limitations is three years from the date of injury. Because Magee alleged no discriminatory conduct occurring after September 12, 1998, the period of limitations on Magee's claims expired, at the latest, three years from that date, or by September 12, 2001. Accordingly, as the trial court held, Magee's February 1, 2002, complaint was not timely filed. *Id.* at 112-113.

Similarly, the Court of Appeals misapplied *Collins* in the instant case. Like Magee, Plaintiff Joliet was never terminated from her employment and she does not allege discriminatory termination. Like Magee, the instant Plaintiff resigned (retired) from her employment as a result of harassment/discrimination that had occurred prior to October 8, 1998. As was true in *Magee*, "Collins, a discriminatory termination case, simply does not apply in this situation."

Applying this Court's opinion in *Magee*, *supra* at 113, because there was no harassment or discriminatory conduct by the Defendants after Frank Bacha left the City's employment on October 8, 1998, the period of limitations on Plaintiff Joliet's claims expired at the latest on October 8, 2001. See, *Magee*, *supra* at 113. Thus, Plaintiff Joliet's civil rights action, which was filed on November 30, 2001, is time barred. *Id.*; MCL 600.5805(10).

As explained in Defendants' Application, the Court of Appeals majority opinion in this case applied this Court's majority opinion in *Jacobson v Parda Federal Credit Union*, 457 Mich 318 (1998) to conclude that the period of limitations began to run on the date that Plaintiff Joliet retired instead of the last date of the Defendants' alleged adverse employment actions. *Magee*, like *Jacobson*, (and the instant case) involved a claim arising out of an alleged constructive discharge. As explained, this Court rejected the Court of Appeals' conclusion in *Magee* that the plaintiff's claim accrued on the date that she resigned from her employment and concluded that the plaintiff's claim accrued on the date of the employer's last adverse action. *Magee*, *supra* at 113. Therefore, *Magee* implicitly overrules this Court's majority opinion in *Jacobson* and implicitly adopts Justice Taylor's dissenting opinion in *Jacobson*, which is what the instant Defendants asked this Court to do in this case.

In summary, this Court should conclude that its recent opinion in *Magee* establishes that the lower courts erred by failing to conclude that Plaintiff Joliet's action accrued by the end of September 1998, or at the latest, October 8, 1998, after which Defendants did not take any adverse employment actions against her and that her Complaint, which was filed on November 30, 2001, is time barred.

III. A December 1, 1998 accrual date for the injury to Plaintiff is not sustainable for Defendant Frank Bacha, where he left his employment with the City of Taylor on October 8, 1998.

As explained in Defendants' Application, MCL 600.5805(1) and (10) bar a person from bringing or maintaining an action to recover damages for injuries to persons unless commenced within three years after the time of injury. Here, Plaintiff admitted that Bacha committed no act of sexual harassment or discrimination after the end of September 1998 and that she never saw him again after that date. In addition, Bacha's employment with the City of Taylor officially ended on October 8, 1998.

The only theory that Plaintiff relied upon in the lower courts to avoid the statutory bar to her claims against Bacha was a "continuing violations" theory. Since Defendants filed their Application in this Court, the Court released its opinion in *Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 284 (2005), in which the Court overruled the "continuing violations" theory that has been applied to civil rights claims as a result of this Court's prior opinion in *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505 (1986). Instead of recognizing a "continuing violations" theory, *Garg* held that, "a person must file a civil rights claim within three years of the date that his or her action accrues, as required by MCL 600.5805(10)." *Garg*, *supra* at 283-284.

Moreover, as Defendants' Application explains, even if a continuing violations theory could be applied to apply to Plaintiff's claims against Bacha, the Plaintiff would still have to establish that he engaged in an act of harassment or discrimination within three years of filing her Complaint. See, *Sumner, supra* at 527-528, 539, 543-544 (1986). Because Plaintiff admitted that Bacha did not commit any act of harassment or discrimination after the end of September 1998 and she did not file her Complaint until November 30, 2001, the continuing violations theory would not apply even if this Court had continued to recognize it in *Garg*. See, *Sumner*, *supra*.

Thus, Plaintiff's action against Bacha cannot be sustained on a "continuing violations" theory. Because that theory does not apply to Plaintiff's civil rights claims against Bach, or Pitoniak, this Court should hold that Plaintiff's action is time barred.

Plaintiff may contend that her entire action should not be dismissed because she also alleged a breach of contract and misrepresentation claim against the Defendants. The period of limitations for her misrepresentation claim is also three years because she is alleging an injury to person or property. See, MCL 600.5805(10).

In addition, as explained on pages 22-23 of Defendants' Application, although Plaintiff labeled her claim as one for breach of contract, she is seeking damages for interference with earning capacity as a result of an alleged constructive discharge from employment. Accordingly, the injury is one to her "person or property" and the three year statute of limitations applies to the alleged breach of contract claim as well. See, *Glowacki v Motor Wheel Corp*, 67 Mich App 448, 460 (1976); *Stringer v Sparrow Hospital*, 62 Mich App 696 (1975); MCL 600.5805(10).

Moreover, Plaintiff did not have an employment contract with Frank Bacha or Gregory Pitoniak. Any employment contract that Plaintiff had would have been with the City of Taylor,

which is not, and cannot be, a party to this action. The period of limitations for Plaintiff to file any claim against the City expired long ago. MCL 600.5805(10); See also, MCL 600.5807(8) (general period of limitations for breach of contract is 6 years.)

RELIEF REQUESTED

Because Plaintiff-Appellee Virginia Joliet's action is time barred, Defendants-Appellants Gregory Pitoniak and Frank Bacha respectfully request that this Honorable Court reverse the lower courts and remand this action to the Wayne County Circuit Court for entry of an order dismissing Plaintiff's action.

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